

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers)	WT Docket No. 05-265
)	
Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services)	WT Docket No. 00-193
)	
To: The Commission		

COMMENTS OF RURAL CELLULAR ASSOCIATION

Rural Cellular Association (“RCA”)¹, by its attorneys, respectfully submits these Comments in response to the Commission’s interest in examining Commercial Mobile Radio Service (“CMRS”) roaming in a manner that takes into account current technological and market conditions.²

I. Introduction

In these Comments RCA urges the Commission to adopt rules that impose good faith, reciprocal bargaining obligations upon CMRS carriers such that voice, data and other wireless services offered over CMRS carriers’ networks will be available automatically, where the networks are compatible and roaming between the carriers is technologically feasible, to any consumer who roams outside the areas that are licensed to the CMRS carrier whose service is purchased by the

1 RCA was formed in 1993 to address the distinctive issues facing wireless service providers serving rural and small market areas. RCA is an association representing the interests of approximately 100 small and rural wireless licensees providing commercial services. Member companies offer service in more than 135 rural and small metropolitan markets where more than 14.6 million people reside in the United States.

2 *Memorandum Opinion & Order and Notice of Proposed Rulemaking*, WT Docket No. 05-265 and WT Docket No. 00-193, FCC 05-160, released August 31, 2005.

consumer. RCA recommends adoption of good faith negotiating standards that mirror those set forth in the *Satellite Home Viewer Improvement Act of 1999* (“SHVIA”), applicable to broadcasters and multichannel video programming distributors. In the event of perceived violations of the negotiation standard, CMRS providers would be subject to the Commission’s common carrier complaint processes for alleged failures to bargain in good faith. If complaints are filed RCA respectfully urges the Commission to utilize expedited procedures to consider and act on those complaints. Otherwise, a delay in action would be detrimental to consumer interests and potentially threaten the economic viability of small and rural carriers. RCA members denied the opportunity to participate in automatic roaming agreements stand to lose large numbers of customers who would act to assure themselves of access to wireless services in more markets even though they may lose, perhaps unknowingly, service availability in portions of the rural markets where they live and work each day.

II. The FCC Should Act to Ensure the Availability of Automatic Roaming in a Consolidating Industry

RCA submits that the Commission should exercise its authority to promote consumers’ automatic access to voice, data and other wireless services provided by CMRS carriers as consumers travel from one market area to another.³ Recent mergers of nationwide CMRS providers have narrowed consumer choices among nationwide wireless carriers. The consolidation of the wireless telecommunications industry to four national carriers (Cingular, Verizon Wireless, Sprint/Nextel, and T-Mobile) and one “super-regional” carrier (Alltel) concentrates among those carriers an extraordinary amount of market power. That market power is not, *per se*, contrary to the public

³ Automatic roaming, as opposed to manual roaming, does not require that the customer contact the serving carrier to arrange payment for use of the serving carrier’s network. With automatic roaming the customer’s access to another carrier’s network is available because the home carrier and the serving carrier have an agreement in place between them that allows customers of either carrier to make and receive calls and/or to send and receive data.

interest but the Commission should act at this time to ensure that consumers are not deprived of efficient access to voice, data and other wireless services as the result of any unwillingness of certain large or small carriers to enter into automatic roaming agreements whenever the carrier networks are technologically compatible following good faith negotiation.⁴

In many markets RCA members provide effective wireless competition to the large carriers. In some areas RCA members fill a void in the marketplace by providing essential wireless services in rural areas that are unserved or underserved by the national and super-regional carriers. A primary means by which the FCC can assure that consumers are well served is to mandate an obligation upon CMRS providers to bargain in good faith with one another to arrive at agreements that allow consumers the use of as many networks as are feasible for access to wireless services throughout the country.

RCA encourages the Commission to adopt measures that will provide the availability of automatic roaming for consumers using wireless devices for voice, data and other wireless applications. Without FCC action, the national and super-regional carriers may exercise their enhanced market power to refuse to enter into roaming agreements with smaller carriers. Consumers may be denied access to signals outside their home areas, which could lessen competition in smaller markets if enough consumers leave their rural carriers to sign up with nationwide wireless carriers.

⁴ In the last year certain RCA members have experienced difficulties in engaging at least one large wireless carrier in negotiation of automatic roaming agreements for wireless data services. Slow or no response stalls or precludes the availability of automatic roaming to consumers.

III. The Commission Should Require “Good Faith” Negotiations by CMRS Carriers When a Carrier Requests an Automatic Roaming Agreement with another Carrier

To promote and expedite the availability of automatic roaming services for consumers RCA requests the Commission to adopt rules that establish a reciprocal bargaining obligation in the negotiation of all roaming agreements, and as needed to review compliance with the good faith rules. To this end RCA recommends adoption of the type of good faith negotiating standards set forth in the *Satellite Home Viewer Improvement Act of 1999* (“SHVIA”), applicable to broadcasters and multichannel video programming distributors.

The FCC is asked to establish the following actions or practices as a violation of the duty of a service provider (Negotiating Entity) to negotiate roaming agreements in good faith:

- Refusal by a Negotiating Entity to negotiate a roaming agreement;
- Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on roaming agreements;
- Refusal by a Negotiating Entity to meet and negotiate roaming agreements at reasonable times and locations, or acting in a manner that unreasonably delays roaming agreement negotiations;
- Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal;
- Failure of a Negotiating Entity to respond to a roaming agreement proposal of the other party, including the reasons for the rejection of any such proposal;
- Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a roaming agreement with any other service provider; and

- Refusal by a Negotiating Entity to execute a written roaming agreement that sets forth the full understanding of the service providers.

In addition to the standards test above, a Negotiating Entity may demonstrate, based on the totality of the circumstances of particular negotiations, that a service provider breached its duty to negotiate in good faith.

RCA submits that it should not be considered a failure to negotiate in good faith if the service provider enters into roaming agreements containing different terms and conditions, including price terms, with different service providers if such different terms and conditions are based on competitive marketplace considerations.

The Commission may follow established precedent, particularly in the field of labor law, in implementing the good faith roaming agreement negotiation requirement. Consistent with Commission action in the *Good Faith Order*⁵ the Commission is urged to adopt a two-part test for good faith.

The first part of the test consists of a brief, objective list of negotiation standards. First, a service provider may not refuse to negotiate with another service provider regarding roaming agreements. Second, a service provider must appoint a negotiating representative with authority to bargain on roaming agreement issues. Third, a service provider must agree to meet at reasonable times and locations and cannot act in a manner that would unduly delay the course of negotiations. Fourth, a service provider may not put forth a single, unilateral proposal. Fifth, a service provider, in responding to an offer proposed by another service provider, must provide considered reasons for

5 *Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues*, 15

rejecting any aspects of the other service provider's offer. Sixth, a service provider is prohibited from entering into an agreement with any party conditioned upon denying a roaming agreement to any service provider. Finally, a service provider must agree to execute a written roaming agreement that sets forth the full agreement between the two service providers.

The second part of the good faith test is based on a totality of the circumstances standard. Under this standard, a service provider may present facts to the Commission which, even though they do not allege a violation of the specific standards enumerated above, given the totality of the circumstances constitute a failure to negotiate in good faith.⁶

The *Good Faith Order* provided examples of negotiation proposals that presumptively are consistent and inconsistent with "competitive marketplace considerations."⁷ The *Good Faith Order* found that any effort to further anti-competitive ends through the negotiation process would not meet the good faith negotiation requirement. The order stated that considerations that are designed to frustrate the functioning of a competitive market are not "competitive marketplace considerations." Further, conduct that is violative of national policies favoring competition -- that, for example, is intended to gain or sustain a monopoly, an agreement not to compete or to fix prices, or involves the exercise of market power in one market in order to foreclose competitors from participation in another market -- is not within the competitive marketplace considerations standard. Likewise, tying is not consistent with competitive marketplace considerations if it would violate the antitrust laws.

Finally, the *Good Faith Order* established procedural rules for the filing of good faith complaints. The burden of proof is on the complainant to establish a good faith violation and

FCC Rcd 5445 (2000) ("*Good Faith Order*"), *recon. granted in part*, 16 FCC Rcd 15599 (2001).

6 *Good Faith Order*, 15 FCC Rcd at 5458.

7 *Good Faith Order*, 15 FCC Rcd at 5469-70.

complaints are subject to a one year limitations period.⁸

With regard to the totality of the circumstances test, large, medium and small-sized CMRS providers occupy different positions when negotiating roaming agreements. The Commission should recognize this distinction when applying the totality of the circumstances test and in determining whether specific terms and conditions are consistent with competitive marketplace considerations. The Commission must always take into account the relative bargaining positions of the parties when examining the totality of the circumstances for a failure to negotiate in good faith.⁹ Identifying additional negotiating proposals that can be considered to reflect a failure to negotiate in good faith under the totality of the circumstances test should be carried out on a case-by-case basis.

By imposing a good faith obligation, the Commission may place upon parties to roaming agreements negotiation obligations greater than those under common law. This heightened duty of negotiation in the roaming agreement process will lead the Commission to develop and enforce a process that causes service providers to meet to negotiate automatic roaming agreements and to ensure that such negotiations are conducted in an atmosphere of honesty, purpose and clarity of process.

IV. The FCC has Jurisdiction to Implement RCA's Recommendations on CMRS Roaming

By the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"),¹⁰ Congress amended §§ 2(b) and 332(c) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §§

8 47 C.F.R. §§ 76.65(d) & (e).

9 For example, a negotiating proposal put forth by a small CMRS operator might be found consistent with competitive marketplace considerations, whereas the same proposal put forth by the nation's largest service provider might not.

10 Pub. L. No. 103-66, § 6000(b), 107 Stat. 312, 392 (codified in scattered sections of 47 U.S.C.).

152(b), 332(c), to place CMRS under a comprehensive Federal regulatory framework¹¹ that would “foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure.”¹² By doing so, Congress gave the Commission plenary authority over the interstate and intrastate practices of CMRS providers, including their practices with respect to roaming.

By inserting “and section 332 of this title” in the first sentence of § 2(b) of the Act, Congress provided that the statutory reservation of state authority over the “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by ... radio of any carrier” does not extend to CMRS to the extent it is covered by § 332. *See* 47 U.S.C. § 152(b). Thus, Congress authorized the Commission to regulate the intrastate charges, practices, classifications, and regulations of CMRS providers, which were regulatory matters previously subject to exclusive state regulation. At the same time, Congress ensured that the Commission would continue to regulate such matters under Title II of the Act.

While the 1993 Budget Act gave the Commission authority to forbear from applying Title II requirements to CMRS providers, § 332(c) explicitly provides that CMRS remain subject to the provisions of § 201 of the Act. *See* 47 U.S.C. § 332(c)(1). Thus, CMRS providers are subject to the requirements that they provide service “upon reasonable request therefor,” *id.* § 201(a), and that their “charges, practices, classifications, and regulations for and in connection with” their interstate services be “just and reasonable.” *Id.* § 201(b). And, of course, § 201(b) explicitly gives the Commission jurisdiction to make rules governing matters to which the Act applies. *See id.* *See also*

¹¹ H.R. Conf. Rep. No. 103-213, at 490 (1993), *reprinted in* 1993 U.S.C.C.A.N. at 1088, 1179.

¹² H.R. Rep. No. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 380(1999).

After the 1993 Budget Act amendment of §§ 2(b) and 332(c), the Act applies to the “charges, practices, classifications, and regulations for and in connection with” the interstate and intrastate services of CMRS providers. Because its jurisdiction always follows where the Act applies, *see AT&T*, 525 U.S. at 380, the Commission has jurisdiction over all the “charges, practices, classifications, and regulations for and in connection with” all CMRS. The breadth of that jurisdiction clearly encompasses the prescription of rules in furtherance of the Commission’s goal of achieving “ubiquitous roaming on CMRS systems.” *Automatic and Manual Roaming Obligations Pertaining to CMRS*, 15 FCC Rcd 21628, 21634 (2000). Thus, the Commission can adopt rules to govern the provision of all CMRS roaming services generally, and the practices of CMRS providers in connection with providing such services specifically. It is empowered to mandate the negotiation of CMRS roaming agreements and to impose reciprocal bargaining obligations on CMRS providers in the conduct of such negotiations.

V. Conclusion

The FCC should promote an automatic roaming environment that will serve the present and future needs of consumers. As the wireless industry matures the Commission should continue to take actions to ensure that consumers will have access to voice, data and other wireless services when they travel outside their home carrier’s licensed markets. Rural carriers will participate in the offering of new service offerings, but only to the extent that their customers are able to use the equipment provided by rural carriers in other areas of the country. The availability of automatic roaming for new types of applications will be as important as it has been to date for voice services.

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Respectfully submitted,

RURAL CELLULAR ASSOCIATION

[Filed electronically]

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November 28, 2005